Vet. App. No. 16-0646

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

DANIEL R. BARNETT
Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

UNITED STATES CODE

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTER ENTRIES

COURT RULES

TABLE OF CITATIONS

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Appellant	)	
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v.	)	Vet.App. No. 16-0646
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ROBERT A. MCDONALD,	)	
Secretary of Veterans Affairs	)	
	)	
Appellee	)	

ON APPEAL FROM
THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUES PRESENTED

1. Whether the Court should affirm the January 12, 2016, decision of the Board of Veterans' Appeals (Board), which denied entitlement to service connection for sleep apnea where the Board did not misapply the provisions of 38 C.F.R. § 3.317 as to medically unexplained chronic multisystem illnesses (MUCMIs) because the medical evidence demonstrates obstructive sleep apnea has at least a partially understood etiology and pathophysiology.

2. Whether the Court should affirm the January 12, 2016, decision of the Board, which denied entitlement to service connection for sleep apnea where the Board did not err, clearly or otherwise, in its reliance upon the June 2013 VA medical examination report or in the absence of a discussion of former-VA Training Letter (TL) 10-03.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Daniel R. Barnett (Appellant) appeals the January 12, 2016, decision of the Board, which denied entitlement service connection for sleep apnea. [R. at 3-8 (2-10)]. On appeal to this Court, he contends the Board erred when it failed to apply the provisions of 38 C.F.R. § 3.317 to his claim and relied upon an inadequate VA examination report. (Appellant's Brief (App. Br.) at 6-15). He asks this Court to vacate the decision on appeal and to remand his claim for additional development and readjudication. Appellant's contentions of error fail to demonstrate the Board committed clear or prejudicial error in reaching its decision, to include in its discussion of the law relevant to his claim and its reliance upon the June 2013 VA examination report.

C. Statement of Relevant Facts

Appellant served in the United States Army from November 1985 to April 1986 [R. at 460 (460)] and from January 2004 to April 2005. [R. at 458 (458)]. His second period of service included active duty in support of Operation Iraqi Freedom in Kuwait and Iraq. [R. at 458 (458)]. In a February 2005 Post-Deployment Health Assessment, Appellant reported his health "stayed the same or got better" during his deployment and denied being tired after sleeping. [R. at 426 (425-429)]; *see also* [R. at 412-413 (410-416)]. He reported having been exposed to "Vehicle or truck exhaust fumes," "JP8 or other fuels," "Loud noises," and "Sand/dust" "[s]ometimes" during his deployment. [R. at 427 (425-429)]; *see also* [R. at 414 (410-416)]. Appellant reported good health and denied trouble

sleeping in a July 2006 Report of Medical History. [R. at 432-433 (432-434)]; *see also* [R. at 443 (442-445) (October 2005 Post-Hurricane Katrina deployment denial of "Still feeling tired after sleeping")].

A June 2006 sleep study for snoring, sleep maintenance insomnia, and hypersomnolence diagnosed "moderate to severe" obstructive sleep apnea. Appellant was recommended a CPAP trial; weight loss and exercise as medically approved; and consideration of an ENT evaluation. [R. at 262 (262)]. A repeat sleep study in August 2006 confirmed the obstructive sleep apnea diagnosis and recommended continued use of a CPAP; weight loss and exercise; and consideration of an ENT evaluation. [R. at 264 (264)]. A December 2006 medical treatment record noted Appellant returned from Iraq in 2005 and was since diagnosed with sleep apnea. [R. at 216 (216-219)].

Appellant filed a claim of entitlement to service connection for sleep apnea in August 2007. [R. at 314, 321, 327 (314-327)]. He denied exposure to environmental hazards during service in the Gulf War and stated he experienced erratic sleep patterns and stress in service, which left him "in a constant tired state" with difficulties "remain[ing] awake and alert during the day." [R. at 322, 326 (314-327)]. The Regional Office (RO) considered and denied his claim in May 2008. [R. at 160 (157-163)]. Appellant filed a notice of disagreement in May 2009 [R. at 150 (150)] and the RO continued to deny his claim in a September 2009 Statement of the Case (SOC). [R. at 136-137 (121-139)]. Appellant filed a VA Form 9, Substantive Appeal, in October 2009. [R. at 110

(110-120)]. In the "Sleep Apnea" section of his statement, he reported experiencing difficulty sleeping in Iraq and constant waking. [R. at 117 (110-120)]. A Supplemental SOC continued the prior denial of his claim in February 2010. [R. at 86-87 (84-89)].

In his April 2013 argument to the Board, Appellant's representative asserted a medical opinion was necessary to address the etiology of his sleep apnea. [R. at 69-70 (68-73)]. The Board remanded the claim to allow for the provision of a VA medical opinion in May 2013. [R. at 62-65 (54-67)]. In June 2013, VA obtained a medical opinion to "Determine [the] nature & etiology of [Appellant's obstructive sleep apnea or OSA], specifically erratic sleep patterns due to stress [in] Iraq." [R. at 26 (26)]. The examiner "extensively reviewed" the claims folder and diagnosed "Elevated BMI and natural aging with residual OSA." [R. at 26 (26)]. She conceded "it is more likely than not that individuals deployed to a combat area will have some sleep disturbance," but "[s]tress is not a known cause of OSA. OSA is predominantly caused by a developmentally narrow oropharyngeal airway and/or elevated BMI, often with superimposed natural aging." [R. at 26 (26)]. The examiner continued, "I do not think his perceived/reported sleep disturbance is the same as his OSA which on the polysomnography showed 94% sleep efficiency. Although within the realm of possibility, since the Veteran was on his AD 15 months of his roughly 50 years on earth, it is less likely than not that his OSA had it's [sic] onset during service." [R. at 26 (26)]. The RO subsequently continued its prior denial of Appellant's

claim in a July 2013 Supplemental SOC. [R. at 17-25 (17-25)].

The Board considered and denied Appellant's claim in its January 12, 2016, decision. [R. at 2-10 (2-10)]. Preliminarily, it found the duties to assist and notify satisfied. [R. at 5-6 (2-10)]. Turning to the merits of the claim, the Board noted Appellant's March and October 2005, as well as July 2006, denials of experiencing trouble sleeping, but found he separately reported a disturbed sleep pattern in April 2005 and was competent to describe his symptoms. [R. at 7 (2-10)]. It summarized the VA examiner's opinion, to include the findings of the primary causes of sleep apnea, which include "a developmentally narrow oropharyngeal airway and/or elevated BMI, often with superimposed aging." [R. at 7 (2-10)]. Based on the "highly persuasive" statements of the VA examiner, the Board found Appellant's sleep apnea was not related to service. [R. at 7 (2-10)]. Additionally, the Board found the current contentions that he experienced sleep apnea during service inconsistent with his post-deployment statements and observed the medical examiner found the in-service sleep disturbances were distinct from the currently-diagnosed sleep apnea. [R. at 8 (2-10)]. The present appeal was filed on February 24, 2016.

III. SUMMARY OF ARGUMENT

This Court should affirm the January 12, 2016, decision of the Board, which denied entitlement to service connection for sleep apnea. Appellant fails to prove either he, or the record, reasonably raised the issue of entitlement to consideration under the MUCMI provisions of 38 C.F.R. § 3.317. In the absence

of a reasonably raised issue, neither the Board, nor the VA examiner, was required to address the regulatory provisions. Likewise, Appellant does not prove the existence of clear or prejudicial error in the lack of a discussion or consultation of former-TL 10-03 by the VA examiner.

IV. ARGUMENT

A. APPELLANT FAILS TO PROVE THE ISSUE OF ENTITLEMENT TO CONSIDERATION UNDER THE MUCMI PROVISIONS OF 38 C.F.R. § 3.317 WAS REASONABLY RAISED BY HIMSELF OR THE RECORD; THIS COURT SHOULD DECLINE TO FIND ERROR IN THE BOARD'S DECISION OR THE EXAMINER'S OPINION ON THIS POINT.

Appellant avers the Board "misinterpreted" the law when it failed to apply the MUCMI provisions of 38 C.F.R. § 3.317 to his claim of entitlement to service connection for sleep apnea. (App. Br. at 6-11). He additionally contends the Board committed clear error when it found the VA examination report satisfied the duty to assist because the examiner did not discuss the provisions of Former-TL 10-01 as to MUCMIs.[1] (App. Br. at 11-13). Because the issue of entitlement to consideration under the MUCMI provisions of 38 C.F.R. § 3.317 was not raised by Appellant or the record, he fails to demonstrate the existence of clear, legal, or prejudicial error committed by the Board.

[1] Appellant does not challenge the adequacy of the Board's reasons or bases for relying upon the June 2013 medical opinion. (App. Br. at 11-15 (arguing, "[T]he Board failed to ensure compliance with the duty to assist")). As he is represented by qualified counsel, this Court should consider any argument related to the Board's reasons or bases for relying upon this opinion to have been "knowing[ly] and intentional[ly] waived," *Pederson v. McDonald*, 27 Vet.App. 276, 281-284 (2015); *see, e.g.*, *Woehlaert v. Nicholson*, 21 Vet.App. 456, 463 (2007) ("This Court . . . will not address issues or arguments that counsel for the appellant fails to adequately develop in his or her opening brief."), and limit its review to the clear error standard.

1. The issue of entitlement to consideration under the MUCMI provisions of 38 C.F.R. § 3.317 was neither raised by Appellant, nor by the record.

The Board is not required "to assume the impossible task of inventing and rejecting every conceivable argument in order to produce a valid decision." *Robinson v. Mansfield,* 21 Vet.App. 545, 553 (2008) (Board required to consider all issues raised either by the claimant or reasonably by the evidence of record), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009). Indeed, as the Federal Circuit has explained, "it is one thing to read a record sympathetically . . . it is quite another to read into the record an argument that had never been made." *Parks v. Shinseki*, 716 F.3d 581, 586 (Fed. Cir. 2013). Therefore, while the Board is required to discuss any reasonably or expressly raised theories of entitlement to service connection, *Robinson*, 557 F.3d at 1361-1362, where the record does not suggest the potential applicability of a regulation or statute, the Board is not required to discuss it. *See Schafrath v. Derwinski,* 1 Vet.App. 589, 593 (1991).

The Secretary acknowledges Appellant served in the Persian Gulf region during the Persian Gulf War. *See* [R. at 458 (458) (DD-214 noting service in Iraq and Kuwait)]; 38 U.S.C. § 101(33) (providing no end date for "Persian Gulf War"); 38 C.F.R. §3.2(j) (same). However, Appellant identifies nothing in the record, apart from the location of his service and diagnosis of obstructive sleep apnea, to suggest the issue of entitlement to service connection pursuant to 38 C.F.R. § 3.317 as a MUCMI was raised by the record. Without an argument from

Appellant or evidence raising the issue of entitlement to consideration under § 3.317, the Board was not obligated to discuss the provisions thereof merely because Appellant was present in the Gulf during the Persian Gulf War period. *Cromer v. Nicholson*, 455 F.3d 1346, 1350 (Fed. Cir. 2006) ("[T]he general evidentiary burden in veterans' benefit cases ... requires that 'a claimant has the responsibility to present and support a claim for [VA] benefits.' " (alteration in original) (quoting 38 U.S.C. § 5107(a))); *Fagan v. Shinseki*, 573 F.3d 1282, 1287 (Fed. Cir. 2009) (same). What is more, even assuming mere presence in the Persian Gulf *was* enough to trigger consideration of the issue, Appellant cannot carry his burden to prove prejudice to his claim as obstructive sleep apnea does not qualify for consideration pursuant to 38 C.F.R. § 3.317 as it is "attributed to a known clinical diagnosis" and does not qualify as a MUCMI. *See Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) ("[T]he burden of showing that an error is harmful normally falls upon the party attacking the agency's determination.").

Section 3.317(a) permits compensation for disabilities due to "qualifying chronic disability" "provided that such disability: (i) Became manifest [during the requisite period]; and (ii) By history, physical examination, and laboratory testing cannot be attributed to any known clinical diagnosis." 38 C.F.R. § 3.317(a)(1). Qualifying chronic disabilities include any chronic disability resulting from an undiagnosed illness or MUCMI as defined by § 3.317(a)(2). Appellant fails to demonstrate eligibility under both prongs of 38 C.F.R. § 3.317(a).

First, while Appellant's argument fails to acknowledge 38 C.F.R. § 3.317(a)(1)(i)-(ii), *see* (App. Br. at 1-16), the terms thereof clearly state a qualifying chronic disability *only* entitles a claimant to compensation where the condition became manifest during the designated period *and* "cannot be attributed to any known clinical diagnosis." Obstructive sleep apnea is a "known clinical diagnosis," as demonstrated by the VA examiner's opinion [R. at 26 (26)] and Appellant's sleep study reports [R. at 262 (262)]; [R. at 264 (264)] of record, to which Appellant's disability has been attributed by "history, physical examination, and laboratory testing." Thus, regardless of whether Appellant's chronic disability is caused by an undiagnosed illness or MUCMI, its attribution to a known clinical diagnosis alleviated the Board of any obligation to discuss the provisions of this regulation.[2] *See also* (App. Br. at 9-11 (disputing the Secretary's reference to sleep apnea as a diagnosed condition not eligible for § 3.317 presumptions in M21-1 Part IV.ii.2.D.1.n.)).

Second, even assuming 38 C.F.R. § 3.317(a)(1)(ii) did not preclude consideration of Appellant's condition, § 3.317(a)(2)(ii) does. Pursuant to § 3.317(a)(2)(ii), "Chronic multisystem illnesses of partially understood etiology and pathophysiology, such as diabetes and multiple sclerosis, will not be

[2] As Appellant's opening brief did not challenge the propriety of the Secretary's regulations and indeed offered no argument on this part of the regulation or citation thereto (App. Br. at 1-16 (citing generally to 38 C.F.R. § 3.317 or more specifically to 38 C.F.R. § 3.317(a)(2)(ii) without reference to 38 C.F.R. § 3.317(a)(1))), any challenge to that regulatory provision must be deemed abandoned. *See Pederson*, 27 Vet.App. at 281-284 ; *see, e.g.*, *Woehlaert*, 21 Vet.App. at 463.

considered medically unexplained." Etiology is medically defined as "the causes or origin of a disease or disorder," DORLAND'S ILLUSTRATED MEDICAL ENCYCLOPEDIA (DORLAND'S) at 652 (32d ed. 2012), while VA routinely defines pathophysiology[3] as the "functional changes associated with or resulting from disease or injury." *See, e.g.*, Schedule for Rating Disabilities; Dental and Oral Conditions, 80 Fed. Reg. 44913, 44914 (proposed July 28, 2015) (to be codified at 38 C.F.R. pt. 4); Schedule for Rating Disabilities; The Organs of Special Sense and Schedule of Ratings—Eye, 80 Fed. Reg. 32513, 32513 (proposed June 9, 2015) (to be codified at 38 C.F.R. pt. 4); Schedule for Rating Disabilities; The Organs of Special Sense and Schedule of Ratings—Eye, 80 Fed. Reg. 10637, 10638 (proposed Feb. 27, 2015) (to be codified at 38 C.F.R. pt. 4). In other words, etiology explains "why" a condition occurs, while pathophysiology explains "what" or "how" it occurs. Both of these factors are at least partially understood for obstructive sleep apnea. *See* 38 C.F.R. § 3.317(a)(2)(ii); (App. Br. at 12, n.1 (defining etiology and pathophysiology)).

Obstructive sleep apnea, the condition with which the VA examiner diagnosed Appellant [R. at 26 (26)], is medically defined as "sleep apnea resulting from collapse or obstruction of the airway with the inhibition of muscle tone that occurs during REM sleep. In adults, it is primarily seen in middle-aged

[3] In medical terminology, pathophysiology is defined as "the physiology of a disordered function." DORLAND'S at 1397. "Physiology" is "the basic processes underlying the functioning of a species or class of species, or any of its parts or processes." *Id.* at 1444.

obese individuals, with a male predominance." DORLAND'S at 117. While Appellant contends the record contained no evidence of obstructive sleep apnea's etiology or pathophysiology (App. Br. at 7, 9-10), the record *does* contain this evidence. The June 2013 VA examiner stated, "Stress is not a known cause of OSA. OSA is predominantly caused by a developmentally narrow oropharyngeal airway and/or elevated BMI, often with superimposed natural aging." [R. at 26 (26)]. The Board cited this evidence in its decision. *Compare* [R. at 7 (2-10) (summarizing the examiner's statements of the causes of obstructive sleep apnea)] *with* (App. Br. at 7, 11 (arguing "the Board pointed to no evidence in the record which spoke to the etiology of the condition" and stating "no evidence demonstrated a confirmed etiology of the condition")). By the plain language of the regulation, the evidence of record, and the medical definition of the condition, obstructive sleep apnea does not qualify as a MUCMI. The etiology (developmental or weight-related) [R. at 26 (26)] and pathophysiology (collapse or obstruction of the airway), DORLAND'S at 117, of the condition are at least "partially understood" and, based on the examiner's statement, it does not fit the legal definition of a condition "without conclusive pathophysiology or etiology." *See* 38 C.F.R. § 3.317(a)(2)(ii); [R. at 26 (26)].

Moreover, while Appellant appears to suggest the etiology of an individual claimant's condition is of paramount concern (App. Br. at 13-14), the plain language of § 3.317 does not relate to knowledge of the etiology or pathophysiology of an individual Veteran's condition, but of the MUCMI itself.

Any other interpretation of the regulation would read out the bright line rule provided regarding diabetes and multiple sclerosis. *See* 38 C.F.R. § 3.317(a)(2)(ii). Thus, while fatigue and/or sleep disturbances are listed as possible signs or symptoms of a MUCMI, 38 C.F.R. § 3.317(b), here the evidence shows the Veteran was diagnosed with sleep apnea of at least partially understood etiology and pathophysiology.

Lastly, Appellant's arguments to this Court fail to acknowledge that in addition to an unknown pathophysiology or etiology, MUMCIs must also be "characterized by overlapping symptoms and signs and ha[ve] features such as fatigue, pain, disability out of proportion to physical findings, and consistent demonstration of laboratory abnormalities." 38 C.F.R. § 3.317(a)(2)(ii). While obstructive sleep apnea has resulted in fatigue, there is absolutely no indication in the record or in Appellant's arguments to this Court that it also has other features similar to those listed in the regulation. To the contrary, the sleep studies of record indicate Appellant's testing results were not abnormal and were consistent with his diagnosis [R. at 26 (26) ("Polysomnography shows . . . which is diagnostic for OSA")]; [R. at 262 (262)]; [R. at 264 (264)], and neither Appellant, nor the medical evidence of record, indicated his sleep apnea results in pain, disability out of proportion to physical findings, or similar idiosyncrasies characteristic of MUCMIs.

In light of the above, the issue of entitlement to consideration of obstructive sleep apnea as a MUCMI was not reasonably raised by the record or Appellant;

the Board did not misapply controlling law; and its statement of reasons or bases was adequate to allow for effective judicial review. The mere fact that the Board did not discuss § 3.317 does not mean the Board erred where, as here, it was not applicable to Appellant's condition. *Robinson*, 557 F.3d at 1361 (holding, "[T]he Board is not obligated to consider 'all possible' substantive theories of recovery."); *Schafrath,* 1 Vet.App. at 593. This Court should affirm the decision on appeal as Appellant failed to satisfy his burden to demonstrate prejudice to his claim resulted from the Board's commission of an error.

2. The June 2013 VA medical opinion was not inadequate as sleep apnea is a condition of at least partially understood etiology and pathophysiology.

"In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim." 38 C.F.R. § 3.159(c)(4). Once an examination is ordered, the examiner must produce an adequate medical opinion. "An opinion is adequate where it is based upon consideration of the veteran's prior medical history and examinations and also describes the disability in sufficient detail so that the Board's evaluation of the claimed disability will be a fully informed one." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (quotations omitted); *Stefl v. Nicholson*, 21 Vet.App. 120, 123-24 (2007). A medical examiner, unlike a rating specialist, need not provide an "adequate statement of reasons or bases" for his or her opinion. *See Stefl*, 21 Vet.App. at 123; *e.g.*, *Ardison v. Brown*, 6 Vet.App. 405, 407 (1994). Instead, the

examiner is only charged with familiarizing himself with the claimant's medical history and using that knowledge, combined with his medical expertise, to render a competent opinion. *Acevedo v. Shinseki*, 25 Vet.App. 286, 293 (2012); *Roberson v. Shinseki*, 22 Vet.App. 358, 366 (2009).

Duty to assist errors are reviewed for clear error, *Hyatt v. Nicholson*, 21 Vet.App. 390, 395 (2007), and subject to the prejudicial error rule. *See* 38 U.S.C. § 7261(b)(2); *Mlechick v. Mansfield*, 503 F.3d 1340, 1344 (Fed. Cir. 2007). It is the claimant's burden to demonstrate both that a duty to assist error occurred and that such error prejudiced his claim. *See Sanders*, 556 U.S. at 406-410. Moreover, the Board is charged with reviewing an examination report or opinion, interpreting its contents, and rendering a factual finding as to whether or not the report or opinion contained sufficient information from which it could render a decision. *See generally Bastien v. Shinseki*, 599 F.3d 1301, 1306 (Fed. Cir. 2010); *Moore v. Nicholson*, 21 Vet.App. 211, 218 (2007), rev'd on other grounds sub nom. *Moore v. Shinseki*, 555 F.3d 1369 (Fed. Cir. 2009). This finding must be preserved absent a showing of clear error. *Hyatt*, 21 Vet.App. at 395.

Pursuant to VA Guidance, a medical opinion addressing 38 C.F.R. § 3.317 need only be obtained "when a Veteran with [Gulf War] service claims symptoms fitting the description of an MUCMI". *See* M21-1 IV.ii.2.D.1.k.[4] As discussed at

[4] This section of the M21-1 was amended on July 14, 2016, after the date of the Board's decision. The historical, November 30, 2015, version of the M21-1 is cited herein and attached to this brief for the Court's use. *See* U.S. Vet.App. R. 28(i).

length above, obstructive sleep apnea is a known clinical diagnosis, has at least a partially understood pathophysiology and etiology, and lacks the features described as required for a condition to qualify as a MUCMI under the definition provided in 38 C.F.R. § 3.317(a)(2)(ii). Therefore, Appellant cannot prove the Board clearly erred when it found the VA examination report adequate despite the lack of an express discussion of MUCMIs. Indeed, as the examiner explained the etiology of Appellant's disability and the medical definition of obstructive sleep apnea explains its pathophysiology, the Board had more than a plausible basis for finding the examination report adequately addressed the medical question at issue in this case.

Additionally, despite Appellant's assertion that the VA examiner did not provide an adequate rationale to support her negative opinion (App. Br. at 12-13), the examiner clearly explained: (1) Appellant's denials of "still feeling tired after sleeping" immediately post-deployment are "more reliable than later recollections"; (2) it is more likely than not that a solider would experience sleep disturbances due to stress during service; (3) stress does not cause obstructive sleep apnea; (4) obstructive sleep apnea is "predominantly caused by a developmentally narrow oropharyngeal airway and/or elevated BMI, often with superimposed natural aging"; (5) Appellant's "perceived/reported sleep disturb[an]ce" during service is not the same as his obstructive sleep apnea; (6) Appellant has an "[e]levated BMI and natural aging with residual" obstructive sleep apnea; and (7) "Although within the realm of possibility," based on the

limited duration of his life Appellant spent on active duty, "it is less likely than not that his OSA had it's [sic] onset during service." [R. at 26 (26)]. From these statements, as well as its finding of inconsistencies in Appellant's most recent lay statements [R. at 8 (2-10)], the Board determined "the weight of the competent evidence is against a finding that current sleep apnea is related to service." [R. at 7 (2-10)]. This was a plausible interpretation of the VA examiner's statements, and Appellant fails to prove the existence of clear error. *See Monzingo v. Shinseki*, 26 Vet.App. 97, 106 (2012) (discussing the Board's and the Court's duty to view a medical opinion "as a whole"). Indeed, Appellant's sole assertion of error relates to the examiner's unestablished obligation to consider whether sleep apnea is a MUCMI. (App. Br. at 11-13). In the absence of clear error in the Board's decision, this Court should affirm the decision on appeal.

B. APPELLANT DOES NOT CARRY HIS BURDEN TO PROVE THE BOARD CLEARLY ERRED WHEN IT FOUND THE VA EXAMINER'S OPINION ADEQUATE DESPITE THE ABSENCE OF A REFERENCE TO FORMER-TL 10-03.

Appellant alternatively asserts the Board committed clear error when it relied upon the June 2013 VA examination report because the examiner did not review the Fact Sheets associated with Former-TL 10-03. In particular, he alleges his reports of exposure to "exhaust, JP8 or other fuels, and sand/dust during Operation Iraqi Freedom" reasonably raised the issue of environmental hazards. (App. Br. at 13-15). These contentions fail to demonstrate the

existence of clear error on the part of the Board, and this Court should affirm the decision on appeal.

VA rescinded TL 10-03 and incorporated portions of it within the VA Adjudications Procedure Manual. *See* M21-1 Parts IV., ii.1.l.6, 9-10; IV.ii.2.C.5. The Fact Sheets identified by Appellant as requiring consideration by the VA examiner relate to Burn Pits; Particulate Matter; Sulfur Fire at Mishraq State Mine; Quarmat Ali Water Treatment Plant; Contaminated drinking water at Camp Lejeune; and Waste Incinerator Near Air Facility in Atsugi, Japan. *See* Former-TL 10-03 at 2-10; M21-1 Part IV.ii.1.l.9.-15. Appellant did not report exposure to environmental hazards in the Gulf War on his application to VA [R. at 322 (314-327)] or otherwise suggest his sleep apnea related to an in-service incident other than his sleep patterns. [R. at 117-118 (110-120)]. Thus he did not expressly raise the issue of entitlement to service connection on the basis of environmental exposures. Nonetheless, the Secretary concedes Appellant reported exposure "sometimes" to exhaust, fuel, and sand/dust during his deployment. *See* [R. at 414 (410-416)]; [R. at 427 (425-429)].

As Appellant denied exposure to burn pits or other hazards; the record does not contain evidence of such exposure; and Appellant does not specify which of the Fact Sheets may relate to his claim, the Secretary is left to speculate as to the basis of his current complaint. *See* (App. Br. at 13-15). Based upon that speculation, the Secretary believes the sole Fact Sheet that could hypothetically be deemed relevant to Appellant's claim would be the "Particulate

Matter" sheet, which defines particulate matter as a "complex mixture of extremely small particles and liquid droplets . . . made up of a number of components, including acids (such as nitrates and sulfates), organic chemicals, metals, and soil or dust particles." *See* Former-TL 10-3 at 5; M21-1 Pt. IV.ii.1.l.10.a.; *see also* [R. at 414 (410-416)]; [R. at 427 (425-429)]. Particulate matter has been shown to relate to "respiratory and cardiopulmonary health effects in specific susceptible general population subgroups to include young children, the elderly, and especially those with existing asthma or cardiopulmonary disease." Former-TL 10-3 at 5; M21-1 Pt. IV.ii.1.l.10.a.

Notably, however, Appellant fails to point to any evidence in the record suggesting a possible relationship between his obstructive sleep apnea and his exposure to dust and sand in service; indicating such exposure qualifies as particulate matter exposure; or identifying him as a member of a "susceptible general population subgroup" that would have triggered the need for the examiner to consult the Fact Sheets in question. (App. Br. at 13-15). Likewise, his bald assertions fail to demonstrate either (1) that the "Fact Sheets" were unknown to, or otherwise ignored by, the examiner or (2) that the examiner was incompetent to render the opinion she reached. *See Hilkert v. West,* 12 Vet.App. 145, 151 (1999) (en banc) (appellant bears burden of demonstrating error on appeal), *aff'd per curiam,* 232 F.3d 908 (Fed. Cir. 2000) (table); *see also Sickels v. Shinseki,* 643 F.3d 1362, 1366 (Fed. Cir. 2011) (noting that, in the absence of clear evidence to the contrary, VA medical examiners are presumed competent);

Monzingo, 26 Vet.App. at 106-07 ("[T]he general presumption of competence includes a presumption that physicians remain up-to-date on medical knowledge and current medical studies."). In light of the brevity and vagueness of Appellant's argument, as well as his failure to demonstrate the VA examiner lacked medical competence or the Board was bound by the former training letter or M21-1, *see* 38 C.F.R. § 19.5, Appellant fails to prove the Board committed clear error when it found the June 2013 medical opinion adequate and the duty to assist satisfied. As he has not proven an inadequacy in the challenged opinion, he does not carry his burden of showing the Board erred in relying thereupon. This Court should affirm the decision on appeal.

V. CONCLUSION

Upon review of all the evidence, as well as consideration of the arguments advanced, Appellant has not demonstrated the Board committed prejudicial error in its findings of fact or its conclusions of law. Because Appellant failed to satisfy his burden of demonstrating the existence of a prejudicial error, the Court should affirm the decision on appeal.

Respectfully submitted,

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ATTACHMENT

Section D. Service Connection (SC) for Qualifying Disabilities Associated With Service in Southwest Asia

Overview

In This Section This section contains the following topics:

Topic	Topic Name
1	General Information on Qualifying Disabilities Associated With Service in Southwest Asia
2	Rating Claims for SC for Qualifying Disabilities
3	General Information on Rating Decisions for Qualifying Disabilities
4	Awarding SC for Qualifying Disabilities
5	Denying SC for Qualifying Disabilities

1. General Information on Qualifying Disabilities Associated With Service in Southwest Asia

Introduction

This topic contains general information on qualifying disabilities associated with service in Southwest Asia, including the

- provisions of
  - the Persian Gulf War (GW) Veterans' Benefits Act
  - the GW Veterans' Act of 1998
  - the Veterans Education and Benefits Expansion Act of 2001, and
  - 38 CFR 3.317
- definitions of
  - qualifying Veteran under 38 CFR 3.317, and
  - Southwest Asia theater of operations
- qualifying chronic disability under 38 CFR 3.317
- definitions of
  - undiagnosed illness
  - medically unexplained chronic multi-symptom illnesses (MUCMI), and
  - functional gastrointestinal disorders (FGIDs)
- examination requirement for MUCMIs
- partially understood MUCMIs
- presumptive period for manifestation of disability under 38 CFR 3.317
- signs and symptoms of undiagnosed illnesses or MUCMIs
- determining chronicity for qualifying disabilities
- presumptive SC for infectious diseases under 38 CFR 3.317(c), and
- considering long-term health effects potentially associated with infectious diseases.

Change Date

November 30, 2015

a. Provisions of the Persian GW Veterans' Benefits Act

On November 2, 1994, Congress enacted the "*Persian Gulf War Veterans' Benefits Act*," Title I of the "*Veterans' Benefits Improvements Act of 1994*," *Public Law (PL) 103-446*.

The PL added a new section, 38 U.S.C. 1117, authorizing the Department of Veterans Affairs (VA) to compensate any Gulf War (GW) Veteran suffering from a chronic disability resulting from an undiagnosed illness or combination of undiagnosed illnesses which manifested either

- during active duty in the Southwest Asia theater of operations during the GW, or
- to a degree of 10 percent or more within a presumptive period following service in the Southwest Asia theater of operations during the GW.

b. Provisions of the GW Veterans' Act of 1998

The "*Persian Gulf War Veterans' Act of 1998," PL 105-277*, authorized VA to compensate GW Veterans for diagnosed or undiagnosed disabilities that are determined by VA regulation to warrant a presumption of service connection (SC) based on a positive association with exposure to one of the following as a result of GW service

- a toxic agent
- an environmental or wartime hazard, or
- a preventive medication or vaccine.

Note: This PL added 38 U.S.C. 1118.

c. Provisions of the Veterans Education and Benefits Expansion Act of 2001

The "*Veterans Education and Benefits Expansion Act of 2001," PL 107-103*, expanded the definition of "qualifying chronic disability" under 38 U.S.C. 1117 to include, effective March 1, 2002, not only a disability resulting from an undiagnosed illness but also

- a medically unexplained chronic multi-symptom illness (MUCMI) that is defined by a cluster of signs and symptoms, and
- any diagnosed illness that is determined by VA regulation to warrant presumption of SC.

Reference: For more information on MUCMIs, see M21-1, Part IV, Subpart ii, 2.D.1.i.

d. Provisions of 38 CFR 3.317

38 CFR 3.317 implements 38 U.S.C. 1117 by defining certain key terms and providing for presumptive SC for

- undiagnosed illness or MUCMIs, and
- a list of infectious diseases.

e. Definition: Qualifying Veteran Under 38 CFR 3.317

A ***qualifying Veteran,*** under 38 CFR 3.317, is a Veteran who served on active military, naval, or air service in the Southwest Asia theater of operations during the GW period.

Per 38 U.S.C. 101(33), the GW period extends from August 2, 1990, through a date yet to be determined by law or Presidential proclamation.

Reference: For a definition of the Southwest Asia theater of operations, see
- 38 CFR 3.317(e)(2), and
- M21-1, Part IV, Subpart ii, 2.D.1.f.

f. Definition: Southwest Asia Theater of Operations

The ***Southwest Asia theater of operations*** includes the following locations and the airspace above them

- Iraq
- Kuwait
- Saudi Arabia
- the neutral zone between Iraq and Saudi Arabia
- United Arab Emirates
- Bahrain
- Qatar
- Oman
- the Gulf of Aden
- the Gulf of Oman
- the Persian Gulf
- the Arabian Sea, and
- the Red Sea.

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g. Qualifying Chronic Disability Under 38 CFR 3.317

Qualifying chronic disability, under 38 CFR 3.317, means a chronic disability resulting from any of the following or any combination of the following

- an undiagnosed illness, or
- an MUCMI.

References: For more information on

- determining chronicity, see M21-1, Part IV, Subpart ii, 2.D.1.o, and
- rating action to be taken based on specific disability patterns, see M21-1, Part IV, Subpart ii, 2.D.2.h.

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h. Definition: Undiagnosed Illness

An ***undiagnosed illness*** is a type of chronic qualifying disability where qualifying signs and/or symptoms cannot be attributed to any known clinical diagnosis by history, physical examination and laboratory tests.

References: For more information on

- signs and symptoms of undiagnosed illness, see M21-1, Part IV, Subpart ii, 2.D.1.n, and
- the examiner's determination of disability pattern, see M21-1, Part IV, Subpart ii, 2.D.2.g.

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i. Definition: MUCMI

An ***MUCMI*** is a type of chronic qualifying disability in which there is a *diagnosed* illness that has

- both
  – an inconclusive pathophysiology, and

– an inconclusive etiology
- overlapping symptoms and signs, and
- features such as
  – fatigue and pain
  – disability out of proportion to physical findings, and
  – inconsistent demonstration of laboratory abnormalities.

MUCMIs include but are not limited to

- chronic fatigue syndrome
- fibromyalgia, or
- functional gastrointestinal disorders (FGIDs), excluding structural gastrointestinal diseases.

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j. Definition: FGIDs

FGIDs are a group of diagnosed conditions that are a type of MUCMI. They are characterized by chronic or recurrent symptoms that are

- unexplained by any structural, endoscopic, laboratory, or other objective signs of injury or disease, and
- may be related to any part of the gastrointestinal tract.

Characteristic FGID symptoms include

- abdominal pain,
- substernal burning or pain,
- nausea,
- vomiting,
- altered bowel habits (including diarrhea, constipation),
- indigestion,
- bloating,
- postprandial fullness, and
- painful or difficult swallowing.

FGID diagnoses include but are not limited to

- irritable bowel syndrome, and
- functional
  – dyspepsia,
  – vomiting,
  – constipation,
  – bloating,
  – abdominal pain syndrome, or
  – dysphagia.

Diagnosis of a FGID under generally accepted medical principles normally requires

- symptom onset at least six months prior to diagnosis, and
- the presence of symptoms sufficient to diagnose the specific disorder at least three months prior to diagnosis.

Important: FGIDs do not include structural gastrointestinal diseases, such as inflammatory bowel disease (such as ulcerative colitis or Crohn's disease) and gastroesophageal reflux disease, as these conditions are considered to be organic or structural diseases characterized by abnormalities seen on x-ray, endoscopy, or through laboratory tests.

Note: The effective date of the amendment to 38 CFR 3.317(a)(2)(i) to include FGIDs was July 15, 2011.

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k. Examination Requirement for MUCMIs

In general, when a Veteran with GW service claims symptoms fitting the description of an MUCMI, as described in 38 CFR 3.317(a)(2)(ii), *before proceeding with a decision*, ensure that an examination with a medical opinion has been obtained.

The opinion must classify the symptom as an MUCMI without conclusive pathology or etiology before SC under 38 CFR 3.317 can be awarded.

Exception: If the diagnosis shown in medical records involves one of the MUCMIs described in 38 CFR 3.317(a)(2)(i)(B) (chronic fatigue syndrome, fibromyalgia, or functional gastrointestinal disorders), then SC is appropriate and a VA examination may only be necessary to determine current level of severity.

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l. Partially Understood Chronic Multi-symptom Illnesses

Chronic multi-symptom illnesses of partially explained etiology and pathophysiology, such as diabetes and multiple sclerosis, are not considered medically unexplained and cannot be considered a qualifying chronic disability for purposes of 38 CFR 3.317.

When adjudicating conditions with partially explained etiology, SC can only be awarded on another basis such as direct SC under 38 CFR 3.303 or presumptive SC under 38 CFR 3.307 and 38 CFR 3.309(a).

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m. Presumptive Period for Manifestation of Disability Under 38 CFR 3.317

The presumptive period for manifestation of qualifying chronic disability under 38 CFR 3.317

- begins on the date following last performance of active military, naval, or air service in the Southwest Asia theater of operations during the GW, and
- extends through December 31, 2016.

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n. Signs and

38 CFR 3.317 specifies the following 13 categories of signs or symptoms that

Symptoms of Undiagnosed Illnesses or MUCMIs

may be manifestations of an undiagnosed illness or an MUCMI

- joint pain
- muscle pain
- neurological signs or symptoms
- headache
- neuropsychological signs or symptoms
- gastrointestinal signs or symptoms
- abnormal weight loss
- fatigue
- sleep disturbances.
- respiratory signs and symptoms (upper and lower)
- cardiovascular signs or symptoms
- skin signs and symptoms, and
- menstrual disorders.

Notes:

- The list of categories is not exclusive; signs or symptoms not represented by one of the listed categories may also qualify for consideration under 38 CFR 3.317.
- A disability that is affirmatively shown to have resulted from a cause other than Southwest Asia service may not be compensated. See 38 CFR 3.317(a)(7).

Example: Sleep apnea cannot be presumptively service-connected (SC) under the provisions of 38 CFR 3.317 since it is a diagnosable condition. If claimed, sleep apnea must be considered on a non-presumptive SC basis.

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o. Determining Chronicity for Qualifying Disabilities

To establish SC for a disability under 38 CFR 3.317, the claimed disability must be chronic, that is, it *must* have persisted for a period of six months.

Measure the six-month period of chronicity from the earliest date on which *all pertinent evidence* establishes that the signs or symptoms of the disability first manifested.

Note: If a disability is subject to intermittent episodes of improvement and worsening within a six-month period, consider the disability to be chronic.

Reference: For a discussion on the types of evidence that may be accepted to establish "objective indications" of a chronic disability, see M21-1, Part IV, Subpart ii, 2.D.2.c-e

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p. Presumptive SC for Infectious Diseases Under

Effective September 29, 2010, presumptive SC is established under 38 CFR 3.317(c) for the infectious diseases listed in the table below if

- the Veteran served on active duty

38 CFR 3.317(c)

– in the Southwest Asia theater of operations during the GW, as indicated in
  - M21-1, Part IV, Subpart ii, 2.D.1.e, and
  - M21-1, Part IV, Subpart ii, 2.D.1.f, or

– in Afghanistan on or after September 19, 2001, and

- the disease becomes manifest to a compensable degree within the time limit specified in the table.

Infectious Disease	Time Limit for Manifestation
Brucellosis	one year
Campylobacter jejuni	one year
Coxiella burnetii (Q fever)	one year
Malaria	• one year, or • at a time when standard or accepted treatises indicate that the incubation period began during a qualifying period of service
Mycobacterium tuberculosis	no time limit
Nontyphoid Salmonella	one year
Shigella	one year
Visceral leishmaniasis	no time limit
West Nile virus	one year

q. Considering Long-Term Health Effects Potentially Associated with Infectious Diseases

The Institute of Medicine of the National Academy of Sciences has identified the conditions listed in column B in the table below as potential long-term health effects associated with the infectious diseases (column A) shown in M21-1, Part IV, Subpart ii, 2.D.1.p.

If a Veteran who is presumed SC for a disease listed in column A is diagnosed with a disease in column B within the time period specified in the table (if no time period is specified, at any time), VA will request a medical opinion as to whether it is at least as likely as not that the condition was caused by the Veteran having had the associated disease in column A.

Note: This does not preclude a finding that other manifestations of disability or secondary conditions were caused by an infectious disease.

Reference: For more information on requesting a medical opinion, see M21-1, Part III, Subpart iv, 3.A.7.

Column A – Infectious Disease	Column B – Associated Condition(s)
Brucellosis	• arthritis • cardiovascular, nervous, and respiratory system infections • chronic meningitis and mengocephalitis • episcleritis

	• fatigue, inattention, amnesia, and depression • Guillain-Barre syndrome • hepatic abnormalities, including granulomatous hepatitis • multifocal choroiditis • myelitis-radiculoneuritis • nummular keratitis • papilledema • optic neuritis • orchioepididymitis and infections of the genitourinary system • sensorineural hearing loss • spondylitis • uveitis
Campylobacter jejuni	• Guillain-Barre syndrome if manifest within two months of the infection • reactive arthritis if manifest within three months of the infection • uveitis if manifest within one month of the infection
Coxiella burnetti (Q fever)	• chronic hepatitis • endocarditis • osteomyelitis • post-Q-fever chronic fatigue syndrome • vascular infection
Malaria	• demyelinating polyneuropathy • Guillain-Barre syndrome • hematologic manifestations (particularly anemia after falciparum malaria and splenic rupture after vivax malaria) • immune-complex glomerulonephritis • neurologic disease, neuropsychiatric disease, or both • ophthalmologic manifestations, particularly retinal hemorrhage and scarring • *Plasmodium falciparum* • *Plasmodium ovale* • *Plasmodium vivax* • renal disease, especially nephrotic syndrome
Mycobacterium tuberculosis	• active tuberculosis • long-term adverse health outcomes due to irreversible tissue damage from

	severe forms of pulmonary and extrapulmonary tuberculosis and active tuberculosis
Nontyphoid Salmonella	reactive arthritis if manifest within three months of the infection
Shigella	• hemolytic-uremic syndrome if manifest within one month of the infection • reactive arthritis if manifest within three months of the infection
Visceral leishmaniasis	• delayed presentation of the acute clinical syndrome • post-kala-azar dermal leishmaniasis if manifest within two years of the infection • reactivation of visceral leishmaniasis in the context of future immunosuppression
West Nile virus	variable physical, functional, or cognitive disability

2. Rating Claims for SC for Qualifying Disabilities

Introduction

This topic contains information about rating claims for SC for qualifying disabilities under 38 CFR 3.317, including

- rating symptoms of a chronic qualifying disability as a single or multiple issue
- information required to decide the issue of SC for a chronic qualifying disability
- role of the Veteran's testimony in establishing signs or symptoms
- role of third party lay evidence in establishing signs or symptoms
- role of non-medical indicators in establishing signs or symptoms
- considering Veterans Heath Administration (VHA) Persian Gulf Health Registry examinations
- VA examiner's determination of disability pattern for claims based on Southwest Asia service
- rating action taken based on disability pattern determination, and
- considering the need for a future examination of an undiagnosed illness.

Change Date

June 3, 2015

a. Rating Symptoms of a Qualifying Chronic Disability as a Single or Multiple Issue

The decision to rate multiple symptoms or signs of a qualifying chronic disability together as a single issue or separately as multiple issues depends on the outcome most favorable to the Veteran.

Although rating multiple manifestations under a single body system will in most cases provide the maximum benefit, be alert to symptoms affecting fundamentally different body systems that may clearly warrant separate consideration.

Notes:

- If SC for several symptoms or signs is denied for the same reason, consider such symptoms and signs as a single issue.
- Assign one hyphenated diagnostic code (DC) on the codesheet to each issue that is separately considered, whether SC is awarded or denied.

b. Information Required to Decide the Issue of SC for a Chronic Qualifying Disability

The following information is required to determine whether SC for a chronic qualifying disability is in order:

- when the disability arose
- whether the disability was severe enough to warrant the award of a compensable evaluation at any time during the presumptive period, unless manifested while in the Southwest Asia theater, and

- whether the disability chronically persisted for at least six months.

Reference: For more information on development requirements for claims based on service in Southwest Asia, see M21-1, Part IV, Subpart ii, 1.E.

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c. Role of the Veteran's Testimony in Establishing Signs or Symptoms

When considering disabilities under the provisions of 38 CFR 3.317, a Veteran's lay statement describing his or her own symptoms of a qualifying disability takes on a greater importance than when considering other claims under direct SC principles.

First, as indicated in M21-1, Part IV, Subpart ii, 1.E.2.a, the threshold for ordering an examination based on claims under 38 CFR 3.317 is low, as the claimant's statement alone, describing symptoms, may be sufficient to trigger an examination.

Second, lay evidence describing symptoms unsupported by clinical findings is sufficient to establish SC under 38 CFR 3.317 as long as there is ***medical evidence showing that "no medical diagnosis" is present***.

Important: The Federal Circuit, in *Joyner v. McDonald*, 766 F.3d 1939 (Fed. Cir. 2014) held that "neck pain," that was unsupported by physical examination findings or laboratory tests, may establish an undiagnosed illness that causes a qualifying chronic disability. This demonstrates the importance of the Veteran's testimony, which is essentially all that is needed for the examiner to characterize the symptoms as an "undiagnosed illness" and for SC to be granted, if all other SC requirements are otherwise met.

References: For more information on
- requesting examinations in GW claims, see M21-1, Part III, Subpart iv, 3.A, and
- the need for an adequate characterization of the disability, see M21-1, Part IV, Subpart ii, 2.D.2.g

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d. Role of Third Party Lay Evidence in Establishing Signs or Symptoms

Lay statements from third party lay witnesses that are competent and credible may help establish the presence of objective indications of a chronic disability.
Such statements may cover
- what the Veteran complained of
- when complaints began
- how long complaints lasted, and
- nature/severity of witnessed signs or symptoms.

Reference: For more information on when evidence is competent and credible, see M21-1, Part III, Subpart iv, 5.

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e. Role of Non-Medical Indicators in Establishing Signs and Symptoms

Non-medical indicators may help establish signs and symptoms of a qualifying disability. Non-medical indicators may include

- time lost from work
- evidence that the Veteran sought medical treatment for his/her symptoms, and
- relevant observations, such as changes in the Veteran's
  – appearance
  – physical abilities, and/or
  – mental or emotional status.

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f. Considering VHA Persian Gulf Health Registry Examinations

In all cases when the Veteran has been examined as part of the Veterans Heath Administration (VHA) Persian Gulf Health Registry, ensure those results have been obtained and considered when rating the GW-related issues.

Reference: For more information on developing for the Gulf War Registry examination, see M21-1 Part IV, Subpart ii, 1.E.1.b.

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g. VA Examiner's Determination of Disability Pattern for Claims Based on Southwest Asia Service

Ensure, before making a decision, that the examination report contains the examiner's determination of disability pattern.

If it does not

- send the examination report and claims folder back to the examiner with a copy of the "notice to examiner" shown in M21-1, Part IV, Subpart ii, 1.E.2.g, and included in the Examination Request Builder - ordering a GW Disability Benefits Questionnaire, and
- ask the examiner to characterize the specific claimed issue(s), as requested in the notice.

Important: The Federal Circuit, in *Joyner v. McDonald*, 766 F.3d 1393 (Fed. Cir. 2014) held that a medical professional does not have to have eliminated all possible diagnoses before the Veteran can be compensated for a disability due to an undiagnosed illness.

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h. Rating Action Taken Based on Disability Pattern Determination

The table below shows the rating action taken based on the VA examiner's determination of disability pattern.

If the examiner determined the Veteran's disability pattern to be …	Then …

• an undiagnosed illness, or • a diagnosable but medically unexplained chronic multi-symptom illness of unknown etiology	award SC under 38 CFR 3.317 if the Veteran is otherwise eligible.
• a diagnosable chronic multi-symptom illness with a partially explained etiology, such as diabetes or multiple sclerosis, or • a disease with a clear and specific etiology	SC • cannot be awarded under 38 CFR 3.317, and • may be awarded only if the medical evidence is sufficient to establish SC on a direct or other presumptive basis.
• an undiagnosed illness, and • the examiner opines that the undiagnosed illness is *not* related to GW service but does *not* provide a statement that the condition was caused by a specific supervening condition or event, or was due to willful misconduct or alcohol or drugs	award SC under 38 CFR 3.317. ***Note***: See 38 CFR 3.317(a)(7) regarding what constitutes affirmative evidence that would prevent payment of qualifying GW condition.
• an undiagnosed illness, and • the examiner opines that the undiagnosed illness is *not* related to GW service but instead is related to a supervening condition or an event that occurred after service. The examiner supports the opinion with a clear medical rationale	SC cannot be awarded under 38 CFR 3.317.

Important: As held in *Gutierrez v. Principi*, 19 Vet.App. 1 (2004) the Veteran is not required to provide evidence linking a qualifying chronic disability listed in 38 CFR 3.317 to events in service, as long as the Veteran meets all other requirements in 38 CFR 3.317.

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i. Considering the Need for a Future Examination of an Undiagnosed Illness

Because the course of an undiagnosed illness cannot be predicted, monitor it by establishing the necessary controls for a future examination within 24 months of the last examination of record.

At the expiration of the control period, review the evidence of record to determine whether reexamination is necessary.

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3. General Information About Rating Decisions for Qualifying Disabilities

Introduction

This topic contains general information about rating decisions for qualifying disabilities, including

- stating the issue in rating decisions for undiagnosed qualifying chronic disabilities
- language for the *Decision* section of the rating decision
- referencing relevant dates in the rating decision
- termination or reduction of benefits previously awarded under 38 CFR 3.317, and
- Southwest Asia Veterans' participation in VA-sponsored research projects.

Change Date

June 3, 2015

a. Stating the Issue in Rating Decisions for Undiagnosed Qualifying Chronic Disabilities

State the issue in the rating decision in claims for undiagnosed qualifying chronic disabilities as *Service connection for* **[specify signs or symptoms]** *as due to a qualifying chronic disability*.

b. Language for the *Decision* Section of the Rating Decision

For every disability for which SC was considered, state the following in the *Decision* section of the rating decision: *Service connection for* **[disability]** *is denied*, or *Service connection for* **[disability]** *is awarded with an evaluation of* **[percent]** *percent effective* **[date]**.

Note: The earliest effective date for entitlement to SC under the provisions of 38 CFR 3.317 is November 2, 1994.

c. Referencing Relevant Dates in the Rating Decision

In the rating decision, explicitly refer to any date that is pertinent to the decision.

This particularly includes the

- dates during which the Veteran served in the Southwest Asia theater of operations, and
- earliest date that a qualifying chronic disability may have become manifest.

Reference: For more information on documenting a decision see M21-1, Part III, Subpart iv, 6.C.

d. Termination or Reduction of Benefits Previously Awarded Under 38 CFR 3.317

Situations may arise that will require termination or reduction of payments previously awarded under 38 CFR 3.317.

Follow the normal procedures for reduction of benefits or severance of SC outlined in M21-1, Part I, 2.

Notes:

- Termination or reduction of benefits paid under 38 CFR 3.317 does not preclude continuation of payments if entitlement can be established for SC based on incurrence or aggravation under the provisions of 38 CFR 3.303 and 38 CFR 3.306, respectively, or based on presumption under the provisions of 38 CFR 3.307.
- 38 CFR 3.500 was amended by the addition of 38 CFR 3.500(y), which specifically requires that severance of SC or reduction of benefits under 38 CFR 3.105(d) or 38 CFR 3.105 (e) be effective the first of the month, 60 days after final notice of the adverse action has been issued to the Veteran.

Example: A physician indicates that the Veteran's condition, which had previously been characterized as an undiagnosed illness that was compensated under 38 CFR 3.317, is now a clinically diagnosed condition with a clear etiology.

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e. Southwest Asia Veterans' Participation in VA-Sponsored Research Projects

Effective December 27, 2001, if a Veteran with Southwest Asia service participates in a VA-sponsored medical research project, SC established for a disability under 38 U.S.C. 1117 or 38 U.S.C. 1118 is protected, regardless of the project's findings.

Exception: SC is not protected if the original award was based on fraud, or military records clearly show that the Veteran did not have the requisite service or character of discharge.

Note: A list of VA-sponsored medical research projects for which SC is protected is published in the Federal Register.

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4. Awarding SC for Qualifying Disabilities

Introduction

This topic contains information about awarding SC for qualifying disabilities, including

- establishing SC for a qualifying chronic disability that began during Southwest Asia service
- establishing SC for a compensable qualifying chronic disability that arose during the presumptive period
- evaluating the level of impairment from an undiagnosed disability by analogy
- using hyphenated DCs for undiagnosed disabilities
- assigning appropriate DCs for disabilities under 38 CFR 3.317
- list of appropriate DCs for undiagnosed disabilities, and
- examples of analogous codes for undiagnosed disabilities.

Change Date

June 3, 2015

a. Establishing SC for Qualifying Chronic Disability That Began During Southwest Asia Service

Establish SC if the qualifying chronic disability, per M21-1, Part IV, Subpart ii, 2.D.1.i, manifested, whether to a compensable degree or not, while the claimant was on active service in the Southwest Asia theater of operations during the GW period.

Include the following sentence in the rating decision: *Service connection is established for* **[disability]** *as due to an undiagnosed illness which began in the Southwest Asia theater of operations during the Gulf War period*.

Reference: For more information on documenting a decision see M21-1, Part III, Subpart iv, 6.C.

b. Establishing SC for a Compensable Qualifying Chronic Disability That Arose During the Presumptive Period

Establish SC if the qualifying chronic disability arose to a compensable degree after the Veteran last served in the Southwest Asia theater of operations during the GW period, regardless of the Veteran's active duty status at the time.

If SC is established during the presumptive period, include the following statement in the rating decision: *Service connection may be presumed for disabilities resulting from undiagnosed illnesses or diagnosed illnesses which arose to a compensable degree after service in the Southwest Asia theater of operations during the Gulf War period. Service connection for* **[disability]** *has been awarded on the basis of this presumption*.

Reference: For more information on documenting a decision see M21-1, Part III, Subpart iv, 6.C.

c. Evaluating the Level of Impairment From an Undiagnosed Disability by Analogy

Evaluate the level of impairment of qualifying chronic undiagnosed disabilities by drawing an analogy to an existing DC in the rating schedule per 38 CFR 4.27.

Precede a discussion of the evaluation criteria in the rating decision with the following statement: *Since the disability at issue does not have its own evaluation criteria assigned in VA regulations, a closely related disease or injury was used for this purpose.*

Reference: For more information on documenting a decision see M21-1, Part III, Subpart iv, 6.C.

d. Using Hyphenated DCs for Undiagnosed Disabilities

Use hyphenated DCs for all undiagnosed disabilities.

The table below describes each of the codes that comprise a complete hyphenated DC

Reference: For more information on analogous DCs, see
- M21-1, Part IV, Subpart ii, 2.D.4.f, and
- M21-1, Part IV, Subpart ii, 2.D.4.g.

Code	Description	Example	Reference
First DC	Should always be one of the DCs established for the undiagnosed illness	8863, for diseases analogous to systemic diseases	For more information on DCs, see • M21-1, Part IV, Subpart ii, 2.D.4.e, and • M21-1, Part IV, Subpart ii, 2.D.4.f.
Second DC	Use the DC that most closely fits the evaluating criteria	6354, for systemic disease	For more information on analogous codes, see M21-1, Part IV, Subpart ii, 2.D.4.g.

e. Assigning Appropriate DCs for Disabilities Under 38 CFR 3.317

In order to properly identify and track disabilities for which SC is awarded or denied based on the *Persian Gulf War Veterans' Act*, a DC series beginning with "88" has been established.

The 88 code is the first element of an analogous code. The second two digits of the 88 code are assigned according to the body system of the analogous code that it precedes.

References: For more information on
- DCs, see M21-1, Part IV, Subpart ii, 2.D.4.f, and
- examples of analogous codes, see M21-1, Part IV, Subpart ii, 2.D.4.g.

f. List of Appropriate DCs for Undiagnosed Disabilities

The table below lists the first element in a hyphenated analogous code and the type of undiagnosed condition to which each code refers.

If the condition is analogous to …	And the analogous code begins with …	Then the first DC is …
musculoskeletal diseases	50	8850
amputations	51	8851
joints, skull, and ribs	52	8852
muscle injuries	53	8853
diseases of the eye	60	8860
hearing loss	61	8861
ear and other sense organs	62	8862
systemic diseases	63	8863
nose and throat	65	8865
trachea and bronchi	66	8866
tuberculosis	67	8867
lungs and pleura	68	8868
heart diseases	70	8870
arteries and veins	71	8871
upper digestive system	72	8872
lower digestive system	73	8873
genitourinary system	75	8875
gynecological system	76	8876
hemic and lymphatic system	77	8877
skin	78	8878
endocrine system	79	8879
central nervous system	80	8880
miscellaneous neurological	81	8881
cranial nerve paralysis	82	8882
cranial nerve neuritis	83	8883
cranial nerve neuralgia	84	8884
peripheral nerve paralysis	85	8885
peripheral nerve neuritis	86	8886
peripheral nerve neuralgia	87	8887
epilepsies	89	8889
psychotic disorders	92	8892
organic mental	93	8893
psychoneurotic	94	8894
psychophysiologic	95	8895
dental and oral	99	8899

g. Examples of Analogous Codes for Undiagnosed Disabilities

The table below contains examples of analogous codes that may be used when evaluating undiagnosed illnesses manifest by the 13 signs or symptoms found in 38 CFR 3.317. For the second code, use a DC with rating criteria that most accurately evaluates manifestations of the disability.

Note: This list does not contain all possible analogous codes.

Reference: For more information on the 13 signs or symptoms of an undiagnosed illness, see 38 CFR 3.317(b).

If the symptom is …	**Then the hyphenated DC is …**
abnormal weight loss	8873-7328, (resection of intestine).
cardiovascular signs or symptoms	8870-7013, (tachycardia).
cardiovascular signs or symptoms	8870-7005, (arteriosclerotic heart disease (ASHD)).
fatigue	8863-6354, (chronic fatigue syndrome).
fatigue	8877-7700, (anemia).
gastrointestinal signs or symptoms	• 8873-7305, (ulcer), or • 8873-7319, (irritable bowel syndrome).
headache	8881-8100, (migraine headaches).
joint pain	8850-5002, (rheumatoid arthritis).
menstrual disorders	8876-7622, (uterus displacement).
muscle pain	8850-5021, (myositis).
neurologic signs or symptoms	8885-85__, (peripheral neuropathy).
neuropsychological signs or symptoms	8893-9300, (organic mental disorder).
signs or symptoms involving the respiratory system (upper or lower)	• 8865-65__, (respiratory system) • 8866-66__, (respiratory system), or • 8868-68__, (respiratory system).
signs or symptoms involving the skin	8878-7806, (eczema).
sleep disturbances	8894-9400, (generalized anxiety).

5. Denying SC for Qualifying Disabilities

Introduction

This topic contains information on denying SC for qualifying disabilities, including

- discussing the denial in the rating decision
- addressing
  - diagnosed illnesses
  - an illness that is not chronic
  - an illness that is attributable to some other etiology
  - a condition that is not shown to exist by the evidence of record, and
  - a qualifying chronic disability that is less than 10-percent disabling.

Change Date

June 3, 2015

a. Discussing the Denial in the Rating Decision

Begin a discussion of the denial of SC in the rating decision with a description of the general requirements for SC under 38 CFR 3.317 and include the following statement.

> *Service connection may be established for disability resulting from undiagnosed illness or a medically unexplained chronic multi-symptom illness that is defined by a cluster of symptoms, or a diagnosed illness that is determined by VA regulation to warrant a presumption of service connection which manifested itself either during active service in the Southwest Asia theater of operations during the Gulf War period, or to a degree of ten percent or more after the date on which the Veteran last performed service in the Southwest Asia theater of operations during the Gulf War period.*

Reference: For more information on documenting a decision see M21-1, Part III, Subpart iv, 6.C.

b. Addressing Diagnosed Illnesses

SC may not be awarded under 38 CFR 3.317 for an illness having a known clinical diagnosis unless it meets the criteria for a qualifying chronic disability shown in M21-1, Part IV, Subpart ii, 2.D.1.g. However, SC under other provisions of the law must be considered.

If SC for a claimed undiagnosed illness is denied on this basis, include the following language in the rating decision.

> *Service connection for* **[claimed disability]** *is denied because this disability is determined to result from a known clinical diagnosis of* **[diagnosed disability]**, *which neither occurred in, nor was caused or aggravated by, service.*

Reference: For more information on documenting a decision see M21-1, Part III, Subpart iv, 6.C.

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c. Addressing an Illness That Is Not Chronic

The requirement for chronicity is fulfilled if the disability has persisted for at least six months. Disabilities subject to episodic improvement and worsening within a six-month period may still be considered chronic. Carefully review all evidence, not just the most recent evidence, prior to determining if a claimed disability is chronic.

If the disability does not meet the six-month requirement, include the following statement in the rating decision.

> *The disability must have persisted for a period of at least six months. Service connection for* **[disability]** *is denied since this disability was first manifested on* **[date]** *and lasted less than six months.*

Reference: For more information on documenting a decision see M21-1, Part III, Subpart iv, 6.C.

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d. Addressing an Illness That Is Attributable to Some Other Etiology

SC under 38 CFR 3.317 cannot be awarded if there is affirmative evidence that an undiagnosed illness was not incurred during active service or is related to a supervening condition or an event that occurred after service or to willful misconduct to include alcohol or drug abuse.

Important: An examiner's conclusion must be supported by a clear medical rationale.

Include the following statement in the rating decision if SC is denied on this basis.

> *Service connection under this provision is precluded if there is affirmative evidence that the disability was unrelated to service in the Southwest Asia theater of operations. Service connection for* **[disability]** *is denied because evidence established that this disability resulted from* **[unrelated event, accident, injury, etc.]**.

Reference: For more information on documenting a decision see M21-1, Part III, Subpart iv, 6.C.

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e. Addressing a Condition That Is Not Shown to Exist by the Evidence of Record

If the evidence of record fails to show that a condition exists or has existed in the past, include the following statement in the rating decision: *There is no evidence that the condition ever existed.*

Reference: For more information on documenting a decision see M21-1, Part III, Subpart iv, 6.C.

f. Addressing a Qualifying Chronic Disability That Is Less Than 10-Percent Disabling

If the Veteran fails to qualify for SC because the severity of the qualifying chronic disability is noncompensable, include the following statement in the rating decision.

Service connection for **[disability]** *is denied since this disability neither arose during service in the Southwest Asia theater of operations, nor was it manifested to a compensable degree after the last date of service in the Southwest Asia theater during the Gulf War period.*

References: For more information on documenting a decision see M21-1, Part III, Subpart iv, 6.C.